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In the Supreme Court of the United States

OCTOBER TERM, 1975

IRVING STERN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ROBERT H. BORK,
Solicitor General,
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Washington, D.C. 20530.

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Petitioner contends that the court of appeals erred in reversing the district court's pretrial order suppressing, as privileged, portions of conversations between himself and an attorney.

Petitioner, vice president of the International Amalgamated Meat Cutters Union, is under indictment in the United States District Court for the Southern District of New York for conspiring to demand and accept, and demanding and accepting, payments from employers of members of his union, in violation of the Organized Crime Control Act of 1970, 18 U.S.C. 1962(c), (d), the Taft-Hartley Act, 29 U.S.C. 186(a), (b), and the Internal Revenue Code, 26 U.S.C. 7201, 7206(1), and for failing to report the payments so received on his tax returns, in violation of 26 U.S.C. 7201, 7206(1).

After a pretrial evidentiary hearing, the district court granted petitioner's motion to suppress, on grounds of attorney-client privilege, portions of conversations between himself and Walter Bodenstein, particularly the material part of a May 18, 1973, meeting between the two men that Bodenstein tape-recorded without petitioner's knowledge. On the government's appeal, the court of appeals reversed (Pet. App. 1a-10a), ruling that the record of the suppression hearing revealed "no basis for concluding that an attorney-client relationship exisited between Bodenstein and [petitioner] * * * at the time of the conversations in question," and that the district court erred as a matter of law in holding the communications to be privileged (*id.* at 2a).

The relevant facts are detailed in the comprehensive opinion of the court of appeals (Pet. App. 3a-7a), upon which we rely. Petitioner is vice president of the Meat Cutters Union. Walter Bodenstein is a New York attorney who operates G.P. Sales, Inc., a meat merchandising company for Iowa Beef Processors ("IBP"), the largest meat packing company in the United States. Bodenstein and petitioner were introduced some years ago by Moe Steinman, Bodenstein's father-in-law.

In June 1972 Bodenstein, who was under investigation by the Internal Revenue Service for income tax violations, told petitioner that petitioner's name had been mentioned in the course of the investigation. Petitioner asked Bodenstein to keep him informed of developments. During the summer and fall of 1972, Bodenstein did so. Upon learning that the investigation related to IBP, petitioner asked Bodenstein to represent him, but Bodenstein declined. At this time petitioner, who knew that Steinman was a subject of

an investigation into IBP's bribery of supermarket officials, expressed fear that his "stock speculations" might be disclosed as a result of the IBP investigation.[1]

In January 1973, petitioner appeared pursuant to subpoena before a New York County grand jury, but he declined to testify. Thereafter, petitioner again met with Bodenstein, told him that the state district attorney's staff had intimated that a connection existed between Steinman and petitioner, and asked Bodenstein to represent him. Bodenstein once again refused.

In March 1973, Bodenstein and Steinman were indicted by a federal grand jury for filing false employers' tax returns. Steinman, Currier Holman (an IBP official), and G.P. Sales, Inc., were also indicted in both federal and state courts for other offenses. In late March 1973, IRS notified petitioner that it was auditing his returns. In early April, petitioner spoke about the audit to Bodenstein, who, unaware that petitioner had already retained counsel and had so notified the IRS, recommended a lawyer.

In May 1973, petitioner met with Bodenstein several times and discussed his fear of being unable to explain the source of $110,000 worth of bonds that he had posted as collateral for loans. Bodenstein was eager to make certain that the bonds were in no way related either to IBP or to his father-in-law Steinman and petitioner was eager to avoid involvement with Steinman. Bodenstein tape-recorded this conversation, without petitioner's knowledge, to prove that neither he, IBP, nor Steinman was connected with the bonds.

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[1]Steinman is named in the indictment as a person through whom some of the alleged bribes were paid to petitioner and his co-defendants.

At the outset of the conversation, Bodenstein repeatedly questioned petitioner in an attempt to elicit statements that Steinman had never paid petitioner anything on behalf of IBP. Petitioner answered simply, "Well, it's true." Petitioner then asked about "the George George thing" concerning a supermarket official by that name and remarked that "Nicky is solid" (referring to Nicholas Abondolo, later named as one of petitioner's co-defendants).[2]

Later in the conversation, Bodenstein elicited considerable detail from petitioner about the bonds and the lenders with whom they had been put up as collateral. Petitioner reiterated that these transactions had "absolutely nothing to do with Iowa [Beef Processors]" and expressed the fear that "they're going to try to link me up with Moe [Steinman]."

Petitioner then questioned Bodenstein about names of expert tax counsel. Bodenstein responded, "I'll tell you what we did when we checked," and then mentioned the names of several experts, including Lou Bender, the tax lawyer whom Bodenstein and Steinman had retained. Finally, Bodenstein suggested, "[w]hy don't you have your lawyer get in touch with Bender."

The balance of the conversation (see Pet. App. 6a) concerned petitioner's fears of being linked to IBP, losing his lawyer if he consulted an outsider, and being unable to explain the source of the bonds.

In response to petitioner's expressions of fear, Bodenstein repeated his own belief that petitioner was not involved with IBP, citing his knowledge of the grand jury testimony of "everybody at IOWA BEEF," including

[2]George's appearance before a grand jury had received publicity. The indictment alleges as an overt act on a conspiracy count that George paid Abondolo $2,000. The district court rejected petitioner's contention that this portion of the conversation was privileged.

his own. Bodenstein further offered to speak to Lou Bender, his tax expert, about the best way for petitioner or his attorney to consult with Bender without causing any "conflict." As Bodenstein put it, "your guy may be better speaking to LOU BENDER than you. I don't know, let me talk to LOU * * * You're not going to lose your guys, you know. They may go on a consulting basis to LOU. * * * Well let me see what LOU says * * *."

1. The decision below correctly applies settled principles concerning privileged communications to the particular facts of this case and does not warrant further review. A person asserting the attorney-client privilege must demonstrate, among other things, that he was seeking legal advise from an attorney in his capacity as a professional legal advisor. *United States* v. *Kovel*, 296 F.2d 918, 921 (C.A. 2). Here, as the court of appeals held, petitioner failed to make such a showing.

As the court of appeals observed (Pet. App. 4a), the conversations between petitioner and Bodenstein at issue "occurred not in an attorney-client context, but in the context of two men under investigation trying to protect themselves from any nuances of corruption that might spill over from one investigation to the other." The relationship between petitioner and Bodenstein was, as the court of appeals further noted (*id.* at 6a), that of "one man under investigation seeking advice and information from another who had been undergoing a similar investigation." Their conversations were characterized by a mutual fear that the investigation would reveal a tie-in between petitioner and IBP, and each was preoccupied with protecting his own interests. Bodenstein wanted further assurances that Steinman had never bribed petitioner on behalf of IBP, and petitioner, who also

did not want to be linked with Steinman, stressed that "most important is to keep a separation" (*id.* at 7a). Petitioner's purpose in contacting Bodenstein was to check the status of the investigation and to communicate his situation to Steinman indirectly.

The court of appeals properly concluded that, insofar as petitioner confided in Bodenstein about the bonds, "it was not * * * with an eye to seeking legal guidance" (*ibid.*). Rather, it was in direct response to questions by Bodenstein, a fellow subject of investigation, concerning whether Bodenstein, his father-in-law, or his business was likely to be implicated in any bribe payments made to petitioner. That petitioner could not reasonably have thought he was consulting Bodenstein as an attorney is demonstrated further by the fact that Bodenstein had on several prior occasions expressly refused to represent petitioner.

Similarly, petitioner's requests for help in choosing expert tax counsel were the pleas of a frightened man looking for a solution to his problems from someone who might be implicated if petitioner failed to come up with an explanation for the bonds. Moreover, having just undergone the ordeal of a tax investigation, Bodenstein was in a position to provide petitioner with advice on securing expert tax counsel. That Bodenstein was an attorney may have been an additional factor that caused petitioner to ask him for advice, but, as the court of appeals correctly held, it was Bodenstein's status as a target of the investigation, not as an attorney, that was of paramount importance in their relationship (*id.* at 8a).[3]

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[3]Petitioner disputes (Pet. 22-23) the court of appeals' reference to Bodenstein as a "potential co-defendant" (Pet. App. 7a-8a), but that characterization was entirely appropriate. Bodenstein himself recognized that he might be implicated in bribe payments to petitioner, as evidenced by his efforts to elicit exculpatory statements from petitioner during the secretly tape-recorded conversation.

2. Petitioner also argues (Pet. 17) that the communications were privileged because Bodenstein was his agent in dealing with attorney Bender. The agency theory, however, is contradicted by the conversation itself, as the court of appeals properly noted (Pet. App. 9a):

> While it was [petitioner] who introduced the subject of tax experts during the May 18 conversation, it was Bodenstein who offered to contact Bender, his own attorney, on [petitioner's] behalf. Moreover, this offer was made well after [petitioner] had already poured out considerable detail about the bonds. Both of these facts are inconsistent with the notion that [petitioner] confided in Bodenstein with an eye to Bodenstein's serving as an agent in communicating with Bender. Certainly Bodenstein's offer to contact Bender was the outcome of the conversation, but it was clearly not the purpose for which [petitioner's] revelations about the bonds were made.

3. Petitioner further contends that the court of appeals improperly usurped the fact-finding function of the district court. However, as the court of appeals noted (Pet. App. 2a), the material facts were undisputed, and it merely corrected the district court's erroneous legal ruling that the communications at issue were privileged (*id.* at 10a).

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

JULY 1975.